

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION, CINCINNATI

Dennis Allen, et al. :

Plaintiffs : **Case No. C-1-01-159**

v. : **Judge Herman S. Weber**
: **Magistrate Judge Timothy S. Hogan**
Leonard Kristal :

and : **PLAINTIFFS MOTION**
: **FOR ORDER**
John Crary :

Defendant

Plaintiffs Dennis Allen, et al. (Plaintiffs) move this Court to issue an Order deeming Plaintiffs refiled cross-motion for summary judgment against Defendant John L. Crary (Crary) as being properly and originally filed on November 10, 2003. The bases for Plaintiffs motion are more fully explained in the accompanying memorandum in support.

MEMORANDUM IN SUPPORT

On November 10, 2003, Plaintiffs filed their combined response to Crary s motion for summary judgment and cross-motion for summary judgment against Crary. (R. 72.) Plaintiffs received notification on November 18, 2003 from the District Court s Clerk s Office that under the new Electronic Case Filing system, parties are no longer permitted to file combined pleadings. Following this notification, the Clerk amended the docket entry for R. 72, and eliminated all reference to Plaintiffs cross-motion for summary judgment against Crary. (See Remark in re (doc. 72) , entered November

18, 2003 on docket sheet.) The Clerk advised counsel for Plaintiffs that they may again file a motion for summary judgment against Crary; however, any subsequent refiling of a motion for summary judgment against Crary would be not be considered filed on November 10, 2003, the date Plaintiffs originally filed their motion for summary judgment.

Plaintiffs strenuously object to the revision of the docket to reflect Plaintiffs cross-motion for summary judgment as filed on November 20, 2003 and the failure to date Plaintiffs motion for summary judgment against Crary as being filed on November 10, 2003. Plaintiffs respectfully request this Court to correct the docket to reflect that in fact the cross-motion for summary judgment against Crary was in fact filed - along with the supporting memorandum and proposed findings of fact and conclusions of law, - on November 10, 2003.

Plaintiffs filing of a cross-motion for summary judgment is entirely consistent with the historical practice of the Southern District of Ohio. Plaintiffs timely filed a combined pleading. Plaintiffs have no knowledge of any rule, either under the Local Rules or the policies and procedures governing the electronic filing system, that precludes the filing of a combined motion - **nor were they notified of any such rule or procedure at any time prior to the filing.** Plaintiffs had no conceivable basis for automatically assuming that the electronic filing system precluded the filing to combined pleadings, which has historically been available to practitioners in the Southern District.

Additionally, the Clerk failed to immediately notify Plaintiffs that the combined pleading and filing was procedurally inappropriate for purposes of entry on the docket sheet. Plaintiffs had previously requested a thirty day extension for the dispositive

motion deadline (R. 60.) (a request still pending before the Court). Plaintiffs would have been able to remedy any procedural issues in the docket before the end of the requested extension had Plaintiffs received prompt notification of any issues related to the effect of following historic practice. As the alleged filing error is purely procedural in nature, Plaintiffs should not be penalized by removal from the docket sheet of the substance of their filing, nor by the docket reflecting - incorrectly - that their cross motion for summary judgment against Crary and supporting documents were filed on a date other than November 10, 2003. Accordingly, Plaintiffs respectfully request the Court issue an Order finding that Plaintiffs' cross-motion for summary judgment against Crary should be deemed filed on November 10, 2003.

Respectfully submitted,

s/ David M. Cook

David M. Cook (0023469)
Stephen A. Simon (0068268)
David M. Cook, LLC
22 West Ninth Street
Cincinnati, Ohio 45202
Phone: (513) 721-7500
Fax: (513) 721-1178

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2003, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Stephen R. Felson, 617 Vine Street, Suite 1401, Cincinnati, Ohio 45202, Trial Attorney For Defendant Crary, Paul D. Marotta, The Corporate Law Group, 500 Airport Blvd., Suite 120, Burlingame, CA 94010, Of Counsel for Defendant Crary, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: Leonard Kristal, 107 Diablo Drive Kentfield, California 94904; Christopher D. Denny and Jennifer Chen, The Corporate Law Group, 500 Airport Blvd., Suite 120, Burlingame, CA 94010, Of Counsel for Defendant Crary.____

s/ David M. Cook

ATTORNEY FOR PLAINTIFFS